Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

MICHAEL J. BOYD,

Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION, and
DAN MORALES, ATTORNEY GENERAL,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the totality of the circumstances, the *Allen* charge, which effectively told the jurors that they had to reach a decision and directed the minority jurors to distrust their own judgment and re-examine their views in light of those of the majority, denied Petitioner Michael J. Boyd ("Boyd") his constitutional right to a fundamentally fair and impartial trial under the Sixth Amendment, and as such, violated Boyd's constitutional right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, entitling Boyd to federal habeas corpus relief.

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The published opinion of the Court of Appeals for the Fifth Circuit is reported at *Boyd v. Scott*, 45 F.3d 876 (5th Cir. 1994) and is included in the Appendix to this Petition, beginning at page A-1. The unpublished Memorandum and Recommendation of United States Magistrate Judge John W. Primomo, filed November 13, 1992, is included in the Appendix, beginning at page B-1. Magistrate Judge Primomo's second Memorandum and Recommendation, filed March 16, 1993, is included in the Appendix, beginning at page C-1. The Order of United States District Judge H.F. Garcia, filed July 27, 1993, adopting Magistrate Judge Primomo's second Memorandum and Recommendation, is included in the Appendix, beginning at page D-1. The unpublished Opinion of Associate Justice Shirley W. Butts of the Court of Appeals for the Fourth Supreme Judicial District of Texas in Appeal No. 04-87-00139 from the 226th District Court of Bexar County, filed February 17, 1988, is included in the Appendix, beginning at page E-1. The unpublished Order denying habeas corpus relief of Judge Ted Butler of the 226th District Court of Bexar County, Texas, filed June 20, 1990, and received on July 9, 1990 in the Texas Court of Criminal Appeals, is included in the Appendix, beginning at page F-1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 30, 1994. *See* Appendix A-1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit had jurisdiction over this proceeding for habeas corpus relief under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

28 U.S.C. § 1254 provides, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

STATEMENT OF THE CASE

The Fifth Circuit Court of Appeals' decision in this case involves an important question of criminal jurisprudence over which there is a clear split in published decisions among the federal circuit courts of appeals. Specifically, the Fifth Circuit held that the *Allen* charge given in Boyd's trial which, standing alone, was coercive in that it told the jury that it ***had*** to reach a verdict and directed the minority jurors to distrust their own judgment and re-examine their views in light of those of the majority, nonetheless does not rise to a level of a constitutional violation. In contrast, the Ninth Circuit, in *Jimenez v. Myers*, 12 F.3d 1474 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 60 (1993), as amended by 40 F.3d 976 (9th Cir. 1994), held that an *Allen* charge which encourages the jurors to work toward unanimity and directs the minority jurors to distrust their own judgment and re-examine their views in light of those of the majority is *de facto* unconstitutionally coercive. Likewise, the Sixth Circuit, in the cases of *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), *cert. denied*, 411 U.S. 986, 93 S.Ct. 2275 (1975), *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977), and *United States v.*

Harris, 391 F.2d 348 (6th Cir. 1968), *cert. denied*, 393 U.S. 874, 89 S.Ct. 169 (1968), held that an *Allen* charge instructing a deadlocked jury that it had to decide the case is unconstitutionally coercive. The Third Circuit, in *Landano v. Rafferty*, 856 F.2d 569 (3rd Cir. 1988), also held that a supplemental charge did not violate the petitioner's constitutional rights because it "did not suggest that the case 'had to be decided' by the particular jury hearing the charge."

The conflict among circuits presents the narrow question of the constitutional limits of verdict-urging by trial court judges. Specifically, the circuit courts of appeals disagree as to whether *Allen* charges, which effectively tell jurors that they must reach a decision and single out the minority jurors to change their minds, are unconstitutionally coercive. The question in this case is whether, under the totality of the circumstances, the *Allen* charge, which instructed the jury that it must reach a verdict and then twice singled out the minority jurors, instructing them to distrust their own judgment and re-examine their views in light of the majority jurors' views, and which was given by the trial court immediately after the jury announced that it was deadlocked, denied Boyd his constitutional rights to a fundamentally fair and impartial trial and Due Process, entitling Boyd to federal habeas corpus relief.

1. Procedural History.

After exhausting state court remedies, Boyd filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that the *Allen* charge given to the

jury in his state court trial violated his constitutional rights. Magistrate Judge John W. Primomo reviewed the record and determined that Boyd was entitled to habeas corpus relief and vacated his conviction. The Magistrate noted that the *Allen* charge in this case not only deviates from the language used in approved *Allen* charges, but uses the same language the Fifth Circuit specifically has rejected. The Magistrate found that the *Allen* charge in this case violated Boyd's constitutional rights. *See* Appendix B-10.

The Director of the Texas Department of Criminal Justice, Institutional Division, and Attorney General (collectively referred to as the "Director"), filed objections to the Magistrate's Recommendation and Report, and for the first time, asserted that Boyd's claim was procedurally barred. The Magistrate issued a second Recommendation and Report holding that Boyd's claim is not procedurally barred. Accordingly, the Magistrate again held that Boyd is entitled to habeas corpus relief. *See* Appendix C-7 through 8.

The Director filed objections to the second Recommendation and Report of the Magistrate. District Court Judge H.F. Garcia conducted a *de novo* review and also determined that Boyd is entitled to habeas corpus relief. The District Court adopted the recommendations and reports of the Magistrate and entered judgment vacating the judgment and sentence against Boyd. *See* Appendix D-1.

The Director then filed an appeal to the Fifth Circuit Court of Appeals. On appeal, the Fifth Circuit conducted a *de novo* review and, relying on the cases of *Lowenfield v.*

Phelps, 485 U.S. 1126, 108 S.Ct. 546 (1988) and *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir. 1975), *cert. denied*, 423 U.S. 837, 96 S.Ct. 63 (1975), reversed the holding of unconstitutionality on the *Allen* charge and remanded the case to the District Court. *See* Appendix A-19. The three-judge panel voted two to one. Circuit Judge Reynaldo G. Garza dissented, stating that he would hold that *Allen* charges such as the one given in Boyd's trial violate a defendant's constitutional right to a fair trial.

2. The *Allen* Charge.

In his state court trial, Boyd pled not guilty to the charge of aggravated sexual assault. The case was tried to a jury, which heard evidence for three days. At approximately 9:55 a.m. on the fourth day of trial, the jury began deliberations on guilt/innocence. At approximately 4:00 p.m., the jury sent a note to the judge that read: "Judge Butler, it is with deep regret that we, the jury, cannot reach an unanimous decision in this case. Thank you. Elena Oviedo, foreman."

The trial court then *immediately* delivered an *Allen* charge and ordered the jury to continue deliberations. The relevant portions[1] of the *Allen* charge given to the jury are as follows:

* * *

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[1] The entirety of the *Allen* charge given by the trial court is set forth in the opinion of the Fifth Circuit in Appendix A and in the November 13, 1992 Memorandum and Recommendation of the Magistrate Judge in Appendix B.

> You should endeavor to reach an agreement if at all possible. *Some jury, sometime, will have to decide this question.*
>
> The issue has been tried out very ably by both sides who have presented this evidence to you, and *a decision has to be reached by a jury. You are that jury,* and *it seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion.*
>
> * * *
>
> *Each juror should listen with deference to the arguments of the other jurors, and with a distrust of his own judgment if he finds the large majority of the jury takes a different view of the case from what he himself takes.*
>
> * * *
>
> You should listen to each other's argument with a disposition to be convinced. *If much the larger number favor one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error as to his views.*

(emphasis added.)

Before the *Allen* charge was read to the jury, Boyd objected to it on the ground that it was coercive and forced the minority jurors to change their views. *See* Appendix E-8 through 9. Approximately one hour after receiving the *Allen* charge, the jury returned with a unanimous verdict of guilty.

REASONS FOR GRANTING CERTIORARI

This case involves issues of substantial importance to criminal jurisprudence over which the Court of Appeals for the Fifth Circuit is in direct conflict with the Courts of Appeals for the Ninth and Sixth Circuits, and with numerous other circuits generally. *Allen* charges were approved by this Court in *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896). In *Allen*, this Court decided that an admonishment to jurors *not* to surrender their individual views in order to reach a verdict is a critical portion of an *Allen* charge.[2] *See Id.*, at 495 S.Ct. at 157. In this case, the Fifth Circuit determined that an *Allen* charge which, standing alone, was coercive in that it told the jury that it ***had*** to reach a verdict and directed the minority jurors to distrust their own judgment and re-examine their views in light of those of the majority, nonetheless does not rise to a level of a constitutional violation. If the decision of the Fifth Circuit is allowed to stand, there will be no clear guidelines regarding the constitutional limits of *Allen* charges for trial and appellate courts to follow instructing deadlocked juries. The Fifth Circuit's decision diminishes the role of a jury and, as a consequence, undermines the proper function of the jury system.

Allen charges given to deadlocked juries which encourage the jurors to work toward unanimity and direct the minority to distrust their own judgment and re-examine their views in light of those of the majority cross

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[2] *Allen* charges have been described, by proponents and detractors alike, as a "dynamite charge" because of their potential to blast a verdict out of a deadlocked jury. *See United States v. Cheramie*, 520 F.2d 325, 329 n.3 (5th Cir. 1975).

the line between neutral instructions and unconstitutionally coercive instructions. The admonishment by the trial court judge to the jury, and to the minority jurors in particular, that they ***must*** reach a verdict and that the minority jurors must distrust their own judgment because they are in the minority, sent a clear message to the jury to unanimously find Boyd guilty. This coercive instruction violates Boyd's constitutional rights and entitles him to federal habeas corpus relief. This Court should reach this result because it is proper, just and because it is required by prior precedent granting habeas corpus relief based upon *Allen* charges that are substantively identical to the charge given in Boyd's trial.

I. THE FIFTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE DECISIONS OF THE NINTH AND SIXTH CIRCUITS REGARDING THE CONSTITUTIONALITY OF COERCIVE *ALLEN* INSTRUCTIONS.

The constitutional inquiry in cases involving *Allen* or supplemental charges given to a deadlocked jury is whether, under the totality of the circumstances, the charge is coercive. *See, e.g., Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984); *Jones*, 472 F.2d at 1186 (6th Cir. 1973). Federal courts, both in direct appeals and habeas corpus cases, hold that an *Allen* charge which instructs a deadlocked jury that it ***must*** reach a verdict improperly coerces the jury and violates the defendant's constitutional rights to due process and a fair and impartial jury trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. *See, e.g., Jimenez v. Myers*, 40 F.3d at 981; *Scott*, 547 F.2d at 335; *Jones*, 472 F.2d

at 1186; *Harris*, 391 F.2d at 355. *Cf. Landano*, 856 F.2d at 576. In addition, other federal courts, while not reaching the constitutional issue, have repeatedly held that *Allen* charges which instruct the jury that it must reach a verdict are coercive and erroneous. *See, e.g., Jenkins v. United States*, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060 (1965); *United States v. Robinson*, 953 F.2d 433, 437 (8th Cir. 1992); *United States v. Amaya*, 509 F.2d 8, 10-13 (5th Cir. 1975); *United States v. Duke*, 492 F.2d 693, 697 (5th Cir. 1975). The Texas Court of Criminal Appeals, relying on the Fifth Circuit opinion in *United States v. Duke*, also expressly condemned *Allen* charges which instruct a deadlocked jury that it must reach a unanimous verdict. *See Edwards v. State*, 558 S.W.2d 452, 454 n.1 (Tex. Crim. App. 1977).

Every circuit court of appeals except the Fifth Circuit has either forbidden the use of an *Allen* instruction or required trial judges to hew closely to the language used in the original *Allen* charge. *See Scott*, 547 F.2d at 336 (*quoting United States v. Bailey*, 468 F.2d 652, 667-668 (5th Cir. 1972)). The modern trend among the circuits is either to prohibit or severely restrict the use of *Allen* charges. *See, e.g., Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 Geo.L.J. 1267, 1332 (April 1993/May 1993). The Third and D.C. Circuits prohibit the use of the *Allen* charge. *See United States v. Graham*, 758 F.2d 879, 883 (3rd Cir. 1985) and *United States v. Thomas*, 449 F.2d 1177, 1184 n.45 (D.C. Cir. 1971) (rejects the use of the *Allen* charge, but permits use of a modified *Allen* charge called a "Thomas instruction" when the jury has reached an impasse and, in the judge's view, has had enough time to deliberate). The First, Second and Fourth Circuits use

Allen charges modified to be fair, neutral and balanced. *See United States v. Nichols*, 820 F.2d 508 (1st Cir. 1987); *United States v. Ruggiero*, 928 F.2d 1289 (2nd Cir. 1991), *cert. denied*, 502 U.S. 938, 112 S.Ct. 372 (1991); *United States v. Boone*, 759 F.2d 345 (4th Cir. 1985), *cert. denied*, 474 U.S. 861, 106 S.Ct. 176 (1985). The Seventh Circuit decided that if a supplemental instruction to a deadlocked jury is necessary, and if the supplemental instruction was given before the jury's retirement, the court may repeat the instruction. *See United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973). The Eighth and Tenth Circuits use a modified *Allen* instruction, which calls upon every juror, not just the minority, to reflect upon the correctness of the preliminary appraisal of evidence. *See United States v. Cortez*, 935 F.2d 135, 140-142 (8th Cir. 1991); *United States v. Smith*, 857 F.2d 682, 684 n.4 (10th Cir. 1988). Finally, the Eleventh Circuit accepts the use of the *Allen* charge, but some disagreement exists within the circuit as to its propriety. *Compare United States v. Brokemond*, 959 F.2d 206, 209-10 (11th Cir. 1992) *with United States v. Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987).

There are no other published cases where federal courts have upheld an *Allen* charge such as the one given in Boyd's trial. In fact, the jury instructions approved by this Court in the *Allen* case establish the ultimate permissible limits for a verdict-urging instruction, which were exceeded in this case. *See also Harris*, 391 F.2d 354-55 ("for a judge to tell a jury that a case must be decided is not only coercive in nature, but is misleading in fact"). The *Allen* charge upheld by the Fifth Circuit in this case undermines the proper function of the jury in favor of indiscriminate judicial coercion. The Fifth Circuit opinion

in this case ignores established precedent within its jurisdiction as well as established precedent in other circuits holding that substantively identical *Allen* charges are unconstitutionally coercive.

In its decision in this case, the Fifth Circuit admitted that the *Allen* charge, standing alone, was coercive in that it essentially told the jury that it ***had*** to reach a verdict, yet held that the *Allen* charge did not rise to the level of a constitutional violation. *See* Appendix A-16. The Fifth Circuit determined that, under the full context of the charge and the case, the charge did more ***to encourage*** *the jurors to reach a verdict* than it did coerce them. *See* Appendix A-17. This is a distinction without a difference. Stated differently, this is exactly the point. The Fifth Circuit holding in this case is in direct conflict with the recent Ninth Circuit opinion in *Jimenez v. Myers* and the Sixth Circuit decisions in *Jones v. Norvell, United States v. Scott* and *United States v. Harris.*

In *Jimenez*, the *Allen* charge sent a clear message that the jurors in the majority were to hold their position and persuade the hold-out juror to join in a unanimous verdict, and that the hold-out juror was to cooperate in the movement towards unanimity. *See Jimenez*, 40 F.3d at 981. In its opinion, the Ninth Circuit established the *de facto Allen* charge doctrine which holds that, under the totality of the circumstances, a supplemental or *Allen* charge, which encourages the jurors to work toward unanimity and the minority jurors to re-examine their view in light of those of the majority, is *de facto* unconstitutionally coercive. Thus, the Ninth Circuit granted habeas corpus relief. *See Id.*, at 980. Similarly, the Sixth Circuit in *Jones* granted habeas corpus relief and held that an *Allen*

charge stating that "it is your duty to reach a verdict if you can possibly do so . . . you 12 people are the only ones that can do it . . . [y]ou twelve people are the only ones" violated the petitioner's constitutional rights. *See Jones*, 472 F.2d at 1185. The Sixth Circuit also held on direct appeal that an instruction that a case "must be decided" violated the defendant's constitutional rights. *See Harris*, 391 F.2d at 355. The Third Circuit's opinion in *Landano*, 856 F.2d at 576, which implies that an instruction suggesting a case had to be decided by that particular jury would violate a defendant's constitutional rights is also in conflict with the Fifth Circuit's decision in this case.

Consistent with the clear implication that coercive verdict-urging raises the specter of constitutionality, circuit courts in numerous cases have recognized that ameliorative measures taken to reduce the impact of *Allen* charges cannot completely cure constitutional defects in interfering with jurors when they are performing their most important role: determining guilt or innocence. *See e.g., Rey*, 881 F.2d at 1453; *Robinson*, 953 F.2d at 437 ("the mere fact that the charge contained some proper language does not cure its defects"). Ameliorative language is necessary, but in some instances, cannot correct the unconstitutional coerciveness of *Allen* charges. *See e.g., Amaya*, 509 F.2d at 13 ("we are . . . unwilling to risk even a small chance of increased – and therefore immediately illegitimate – jury coercion over that which inheres in the borderline *Allen* charge merely for the sake of instructional novelty. . . . [T]o hold otherwise would turn this court into a psychologists' symposium with resultant

great expenditures of energy and yet necessarily capricious solutions"); *Duke*, 492 F.2d at 697. In fact, the Sixth Circuit held that much more extensive ameliorative language than was present in the *Allen* charge given in Boyd's trial could not cure the constitutional defect of an *Allen* charge that instructed the jury that it must reach a verdict. *Harris*, 391 F.2d at 352-53. Thus, the Fifth Circuit's opinion in this case is in direct conflict with opinions of other circuits.

II. THE *ALLEN* CHARGE IN BOYD'S TRIAL WENT BEYOND THE CONSTITUTIONALLY PERMISSIBLE LIMITS ESTABLISHED IN *LOWENFIELD* AND *BRYAN*.

The Fifth Circuit held that the holdings of *Lowenfield v. Phelps*, 485 U.S. 1126, 108 S.Ct. 546 (1988) and *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir. 1975), *cert. denied*, 423 U.S. 837, 96 S.Ct. 63 (1975) require reversal of the District Court's grant of Boyd's petition for habeas corpus relief. *See* Appendix A-16 through 18. According to the Fifth Circuit, the facts of *Lowenfield* and *Bryan* suggest that habeas corpus relief requires more egregious circumstances than those present in this case. *See* Appendix A-18. The opposite, however, is true. The Fifth Circuit's opinion and reliance upon these inapposite authorities conspicuously overlooks established precedent within its jurisdiction and establishes a clear conflict with other circuits that hold substantively identical charges unconstitutionally coercive.

The Fifth Circuit's reliance upon *Lowenfield* is misguided. In *Lowenfield*, the state trial court polled the

deadlocked jury as to whether further deliberations would be helpful in the sentencing phase of a capital case. Eleven jurors answered affirmatively and one juror answered negatively. The trial court then gave an *Allen* charge to the jury. The *Allen* charge did not tell the jury that it had to reach a verdict. Instead, the trial court explicitly stated in its *Allen* charge that, if the jury was unable to reach a sentence, the court would impose a life sentence, without parole. This Court held that the combination of jury polling and the *Allen* charge was not unconstitutionally coercive and that the petitioner was not entitled to habeas corpus relief based upon these facts. *See Lowenfield*, 484 U.S. at 240-42, 108 S.Ct. at 552. This Court was careful to explain that the polling of the jury did not inquire as to the jurors' positions on the merits. Thus, there would be no reason why the jurors in the minority would conclude that further deliberations would not be helpful, and no reason to conclude that the jury poll would impermissibly coerce the minority jurors.

The facts of this case are just the opposite. The trial judge in this case told the jury in Boyd's trial that they ***must*** reach a verdict. In addition, the fact that the court delivered the *Allen* charge immediately and without the jury requesting it heightens the coerciveness of the verdict urging. *See, e.g., United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) (*Allen* charge should not be given during deliberations unless jury requests it). In *Lowenfield*, by contrast, the jury itself had requested the charge. Finally, unlike *Lowenfield*, the trial judge in Boyd's case twice singled out the minority jurors and pressured them into voting with the majority. Thus, *Lowenfield* does not support the Fifth Circuit's position.

The Fifth Circuit's reliance upon *Bryan* is similarly misguided. In *Bryan*, the trial judge *sua sponte* called the jurors into the courtroom after about five and one-half hours of deliberation and asked whether they were close to a verdict. The jury responded that they were not close to a verdict, but significantly, did not indicate that they were deadlocked. *See Bryan*, 511 F.2d at 645. The trial court then gave the jury an *Allen* charge and instructed them to continue deliberations. The *Allen* charge did not contain language similar to the charge given in Boyd's trial. The Fifth Circuit held that the *Allen* charge given in *Bryan* did not render the trial so fundamentally unfair as to entitle the petitioner to federal habeas corpus relief. *See Id.* at 646. The *Allen* charge and the subsequent discussion between the trial judge and jurors in *Bryan*, unlike this case, did not state or suggest that the jury ***must*** return a verdict. Moreover, the *Allen* charge in *Bryan* was given by the trial court *sua sponte* and without any indication from the jury that it was deadlocked or could not reach a verdict. *Id.* at 645. Thus, *Bryan* does not support the Fifth Circuit's position that Boyd is not entitled to habeas corpus relief.

The standard for granting federal habeas corpus relief based upon a state court criminal conviction is whether the petitioner has been deprived of his constitutional rights. *See, e.g., Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1737 (1977). Neither *Lowenfield* nor *Bryan* involved *Allen* charges which directed minority jurors to work toward unanimity, distrust their own judgment and re-examine their views in light of those of the

majority. Neither *Lowenfield* nor *Bryan* involved *Allen* charges with directly coercive language. The Fifth Circuit admitted that the language of the *Allen* charge given in Boyd's trial was itself coercive. The District Court in this case properly analyzed all of the circumstances surrounding the charge and determined that the facts supported the conclusion that the jury had, in fact, been coerced into reaching a verdict, depriving Boyd of his constitutional rights.

The Fifth Circuit strains its analysis in this case by focusing on the length of deliberations surrounding the *Allen* charge while disregarding the coercive language of the charge itself. The Fifth Circuit asserts that the *Allen* charge given in Boyd's trial could not have been coercive because the jury in Boyd's trial engaged in lengthier deliberations after hearing the *Allen* charge than did juries in other cases for which habeas corpus relief was denied. *See* Appendix A-17. However, the language used in the *Allen* charge is the most important focus of judicial scrutiny. The Fifth Circuit's narrow focus upon the length of deliberations in Boyd's trial is erroneous. No court should decide the constitutionality of an *Allen* charge solely by focusing on the length of deliberations in the case. The language is what ultimately made the *Allen* charges in *Lowenfield* and *Bryan* permissibly coercive. The language used in the *Allen* charge in Boyd's case makes the charge unconstitutionally coercive.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Attorneys for Petitioner

Submitted March 30, 1995

Michael J. BOYD, Petitioner-Appellee,

v.

Wayne SCOTT, Director, Texas Department of Criminal Justice, and Dan Morales, Attorney General, Respondents-Appellants.

No. 93-8563.

United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1994.

Defendant who had previously been convicted of first-degree felony aggravated sexual assault in state court petitioned for federal habeas relief. The District Court for the Western District of Texas, H.F. Garcia, J., granted defendant's petition, and appeal was taken. The Court of Appeals held that Allen charge given to deadlocked jury after it had deliberated for roughly four-and-one-half hours was not unconstitutionally coercive, and did not warrant grant of habeas relief.

Reversed and remanded.

Reynaldo G. Garza, Circuit Judge, filed dissenting statement.

Amy Holley Hennessee, Asst. Atty. Gen., Dan Morales, Atty. Gen., Austin, TX, for appellants.

Beth L. Fancsali, Larry A. Gaydos (Court-appointed), Haynes and Boone, Fort Worth, TX, for appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

In this appeal by the Attorney General and the Director of the Department of Criminal Justice of the State of Texas, Respondents-Appellants Wayne Scott and Dan Morales (hereafter "Scott"), challenge a district court order granting Petitioner-Appellee Michael Boyd a writ of habeas corpus. Scott asserts that the district court erred in concluding that Boyd's trial was fundamentally unfair as a result of the state trial court's giving an Allen charge that unconstitutionally coerced the jury into reaching a verdict. Scott also contends that, as the state court of appeals based its rejection of Boyd's claim regarding the Allen charge on adequate and independent state procedural grounds, Boyd's claim was procedurally barred from federal court review. Thus, Scott asserts, the district court erred procedurally in reviewing Boyd's claim and substantively in granting his petition for writ of habeas corpus.

Our de novo review of this appeal leads us to conclude that, as the state appellate court failed to state clearly and expressly that its rejection of Boyd's claim rested on adequate and independent state procedural grounds, his claim was not procedurally barred from federal review. As such, we are convinced that the district court did not err in reviewing Boyd's claim.

We are equally convinced, however, that the district court did err when it determined that the Allen charge given to the jury rose to the level of a constitutional violation. Although we have reviewed similar Allen

charges on direct appeal, and have held that the charges were coercive, we here conclude that, pursuant to the level of review required for federal habeas cases, the instant Allen charge did not render Boyd's trial fundamentally unfair. As such, Boyd's constitutional due process right was not violated. Based on these conclusions we reverse the district court's order granting Boyd's petition for writ of habeas corpus and remand for dismissal in accordance with this opinion.

I

FACTS AND PROCEEDINGS

Michael Boyd was charged in state court with first-degree felony aggravated sexual assault, to which he pleaded not guilty. Boyd's case was tried before a jury which, after hearing evidence for three days, began its deliberations on the fourth day of the trial. After approximately five hours of deliberation, the jury notified the judge that it could not reach a unanimous decision. In response to that information the trial judge read the following supplemental Allen charge[1] to the jury.

> In response to the information you have given me, I give you the following instructions, and I

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[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The phrase "Allen charge" refers to supplemental jury instructions that urge deadlocked juries to forego their differences in order to reach a unanimous verdict. The original Allen charge urged the minority of the jury to consider the views of the majority in an effort to determine whether the minority views were reasonable under the circumstances. Id. at 501, 17 S.Ct. at 157.

want you to pay close attention to what I tell you:

You should endeavor to reach an agreement if at all possible. Some jury, sometime, will have to decide this question.

The issue has been tried out very ably by both sides, who have presented this evidence to you, and a decision has to be reached by a jury. You are that jury, and it seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion.

Of course, the verdict of the jury should represent the opinion of each individual juror. But that does not mean that the opinion may not be changed by a conference in the jury room.

The very object of the jury system is to secure unanimity by comparison of views and by argument among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors, and with a distrust of his own judgment if he finds that a large majority of the jury takes a different view of the case from what he, himself takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment, or that he should close his ears to the arguments of other jurors who are equally honest and intelligent as himself.

Accordingly, although your verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you, however, that you should examine what has been submitted to

> you with an open mind, and with candor and proper regard and deference to the opinion of each other.
>
> It is your duty to decide the case if you can conscientiously do so.
>
> You should listen to each other's arguments with a disposition to be convinced. If much the larger number favor one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error as to his views.
>
> I want you to go back to the jury room and continue your deliberations. Discuss the matter among yourselves in a friendly spirit and endeavor to agree upon a verdict.
>
> These are the instructions of the Court.

Approximately one hour and twenty minutes after hearing the Allen charge, the jury reached a unanimous guilty verdict.[2]

Boyd appealed his conviction to the Texas Fourth Court of Appeals, which affirmed the trial court judgment. The Texas Court of Criminal Appeals refused Boyd's petition for discretionary review, and dismissed without prejudice Boyd's subsequent application for a state writ of habeas corpus. Boyd then petitioned a federal district court for a writ of habeas corpus, alleging that the Allen charge that was given to the jury violated

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[2] Boyd objected to the supplemental instruction before it was read on the ground that it forced the minority jurors to change their views.

his right of due process in that it unconstitutionally coerced the jury into reaching a verdict.

A magistrate judge reviewed Boyd's petition for habeas corpus relief and concluded that the Allen charge that was given here unconstitutionally coerced the jury into reaching a verdict, thus making Boyd's trial fundamentally unfair. Consequently the magistrate judge recommended that the district court grant Boyd's petition for habeas corpus. Scott objected to the magistrate judge's recommendation, contending that any inherent coerciveness in the Allen charge did not rise to the level of a constitutional violation, the level of harm required for a grant of federal habeas corpus relief. Scott also asserted for the first time that Boyd's claim was barred procedurally from federal court review.

In response to Boyd's objections the magistrate judge issued a second memorandum and recommendation, concluding that Boyd's claim was not procedurally barred. The magistrate judge determined that even if Boyd's claim was defaulted procedurally, the default was excusable as it was caused by ineffective assistance of trial counsel. The magistrate judge recommended that Scott's procedural default defense be rejected. The district court ultimately adopted the magistrate judge's memoranda and recommendations, rejecting Scott's objections, vacating Boyd's state court conviction, and granting Boyd's petition for writ of habeas corpus. Scott appeals the district court order that granted a writ of habeas corpus to Boyd.

II

ANALYSIS

A. STANDARD OF REVIEW

In appeals pertaining to habeas corpus, we review the district court's findings of fact for clear error and rulings of law de novo.[3] Thus, we review de novo this appeal which challenges both the district court's determination that Boyd's claim was not barred procedurally and that court's determination that Boyd's petition for writ of habeas corpus should be granted because the instant Allen charge was unconstitutionally coercive.[4]

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[3] Williams v. Collins, 16 F.3d 626, 630 (5th Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994); see also, Baty v. Balkcom, 661 F.2d 391, 394 n. 7 (5th Cir.1981) (stating that standard of review for questions of law and mixed questions of fact and law allows reviewing court to substitute its judgment for that of lower court), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982).

[4] We note that the standard of review for an Allen charge raised on direct appeal is not the same as for an Allen charge raised pursuant to a writ for habeas corpus. Errors complained of in a petition for habeas corpus must rise to the level of a constitutional violation, whereas, on direct appeal the error complained of must rise to the level of plain error.

B. PROCEDURAL BAR[5]

Scott asserts that the district court erred in reviewing Boyd's claim because the state court of appeals had addressed and rejected Boyd's claim on grounds of adequate and independent state procedure.[6] If a state court

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[5] Boyd claims that, as Scott's objections to the magistrate's report were filed after the ten day filing deadline prescribed by 28 U.S.C. § 636(b)(1), the objections were waived and cannot be raised on appeal. See 28 U.S.C. § 636(b)(1) (1988) (requiring party to serve and file written objections to magistrate's proposed findings and recommendations within ten days of being served). This claim is without merit in that Scott's objections were timely pursuant to Rule 6 of the Federal Rules of Civil Procedure, which excludes weekends and legal holidays from the computation of the ten day period. See FED.R.CIV.P. 6 (1994) (providing that when period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation). Scott received the magistrate's memorandum and recommendation on Thursday, March 25, 1993, and filed his objections on Tuesday, April 6, 1993. Pursuant to Rule 6 the two intermediate weekends between these dates are excluded from computation. Thus, Scott's objections were timely.

[6] Scott bases this argument on the portion of the state court opinion that addresses Boyd's objection made at trial before the Allen charge was read to the jury. (Boyd objected to the charge on the ground that it was coercive and forced the minority jurors to change their views.) The court noted that Defense counsel [Boyd] objected to specific language in the charge, but not to the language complained of on appeal. To preserve error a trial objection must distinctly specify each ground of objection. TEX.CODE CRIM.PROC.ANN. art. 36.14 (Vernon Supp.1988). Objections to the charge must be made before it is read to the jury, and must specify every ground of objection. Blackwell v. State, 294 S.W. 852, 854-55 (Tex.Crim.App.1927). The error asserting improper instruction is based on a claim which was not presented as a timely objection to the trial court's charge.

decision rejecting a federal habeas petitioner's constitutional claim "rests on an adequate and independent state procedural bar, and does not fairly appear to rest primarily on federal law, we may not review the merits of the federal claim absent a showing of cause and prejudice for the procedural default, or a showing that our failure to review the claim would result in a complete miscarriage of justice."[7] Procedural default does not bar consideration of a federal claim, however, unless the last state court rendering a judgment in the case clearly and expressly

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Given the objection made on appeal, the court would have had an opportunity to delete the complained of language. Boyd v. State of Texas, No. 04-87-00139CR, 9-10 (Tex.Ct.App. – San Antonio [4th Dist.] 1988). Scott asserts that the state procedural rule – that an objection at trial must correspond to the point of error on appeal – is strictly and regularly followed by the Texas courts, thereby satisfying the "adequacy" requirement for a procedural bar.

[7] Young v. Herring, 938 F.2d 543, 546 (5th Cir.1991) (citing Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)), cert. denied, ___ U.S. ___, 112 S.Ct. 1485, 117 L.Ed.2d 627 (1992); accord Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983) (when state court decision fairly appears to rest primarily on federal law, or interwoven with federal law, and when adequacy and independence of state law ground is unclear, Court presumes there is no independent and adequate state law ground for state court decision). "A state procedural ground to bar consideration of an issue is not adequate unless it is 'strictly or regularly followed.' " Wilcher v. Hargett, 978 F.2d 872, 879 (5th Cir.1992) (quoting Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988)), cert. denied, ___ U.S. ___, 114 S.Ct. 96, 126 L.Ed.2d 63 (1993).

states that its judgment rests on a state procedural bar.[8] Furthermore, when a state court concludes that an issue is rejected on the basis of state procedural grounds, but also reaches the merits of a case, the state court must make a stronger showing that it relied on its rules of procedure to reach its conclusion and not on the merits of the federal claim.[9]

In responding to Scott's claim that Boyd's petition was barred procedurally, the magistrate judge found that, even though the state court noted that Boyd's failure to object specifically to the language complained of on appeal ("you are that jury") was barred procedurally pursuant to state law,[10] the court also reached the merits

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[8] Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). This clear and express statement is also referred to as the "plain statement requirement." But see, Young v. Herring, 938 F.2d 543, 549 (5th Cir.1991) (state court decision may be ambiguous for purposes of "plain statement requirement" if we cannot ascertain whether state court based decision on merits of federal claim or on state procedural bar), cert. denied, ___ U.S. ___, 112 S.Ct. 1485, 117 L.Ed.2d 627 (1992).

[9] Id. "The key is not the clarity of the state court's language, or even whether the state court addressed the merits of the federal claim, but whether the state court may have based its decision on its understanding of federal law." Id. at 553-54. A state court may address the merits of a federal claim in an alternative holding without permitting federal review if the original holding is based on adequate and independent state grounds, and if such results and reasons are stated clearly and expressly. Id. at n. 12.

[10] See TEX.CODE CRIM.PROC.ANN. art. 36.14 (Vernon Supp.1988) (requiring that trial objection to charge must distinctly specify each ground of objection in order to be preserved for appeal).

of the issue based on federal law to conclude that the Allen charge did not have a coercive effect on the jury. The magistrate judge concluded that, as the state court decision was interwoven with federal law, and did not express clearly that its decision was based on state procedural grounds, Boyd's claim was not procedurally barred from review.[11]

Our de novo review of the state appellate court opinion confirms the findings of the magistrate judge. Thus we conclude that the issue is not procedurally barred from federal habeas review, so the district court did not err in reviewing Boyd's claim regarding the Allen charge.

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[11] Scott asserts that when a state court bases its decision on the alternative grounds of procedural default and a rejection of the merits, a federal court must, in the absence of good cause and prejudice, deny habeas relief because of the procedural default. See e.g., Harris v. Reed, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 1044 n. 10, 103 L.Ed.2d 308 (1989) (requiring federal court to honor a state court holding that presents sufficient basis for the judgment even if state court established alternative holding by relying on federal law). The magistrate considered this argument, and while agreeing with Scott's basic premise, reiterated that in this case, it was not clear that the state court's discussion of the merits was, as suggested by Scott, an alternative holding. Scott contends that it is standard practice in Texas for a state court to address the merits of a claim such as Boyd's, because under Texas law, a trial error which is so egregious as to constitute 'plain error' does not require objection at trial in order to justify reversal. Scott asserts that the state court's substantive look at Boyd's claim was merely an inquiry into whether an Allen charge is so prejudicial as to dispense with the procedural requirement of an objection. This argument is unpersuasive in that nothing in the record indicates that the court discussed the merits of Boyd's claim in order to bolster its conclusion the claim was barred based on state procedural grounds.

C. THE ALLEN CHARGE

1. The District Court's Analysis

" 'To obtain review of a state court judgment under [28 U.S.C.] § 2254, a prisoner must assert a violation of a federal constitutional right.' "[12] "A federal writ of habeas corpus is available to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' "[13] Thus, a federal court reviewing a petition for a writ of habeas corpus must consider whether, under the totality of the circumstances, the errors complained of were so gross or the trial was so fundamentally unfair that the petitioner's constitutional rights were violated.[14]

In granting Boyd's petition for writ of habeas corpus, the district court adopted the magistrate judge's conclusion that the Allen charge in issue was so coercive that it rendered Boyd's trial fundamentally unfair. The court held that, as Boyd's right of due process was violated, he was entitled to habeas corpus relief. Scott appeals, asserting that the coercive effect, if any, of the Allen charge did not rise to the level of a constitutional violation. Thus, Scott argues, the court erred in granting Boyd's petition for writ of habeas corpus. We agree.

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[12] Gray v. Lynn, 6 F.3d 265, 268 (5th Cir.1993) (quoting Lowery v. Collins, 988 F.2d 1364, 1367 (5th Cir.1993)).

[13] Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir.1975) (citing 28 U.S.C.A. § 2254(a)), cert. denied, 423 U.S. 837, 96 S.Ct. 63, 46 L.Ed.2d 55 (1975).

[14] Id. (citing Young v. Alabama, 443 F.2d 854, 855 (5th Cir.1971), cert. denied, 405 U.S. 976, 92 S.Ct. 1202, 31 L.Ed.2d 251 (1972).

In his first memorandum the magistrate judge acknowledged the general rule that a federal court will reverse a state court conviction based on an erroneous jury instruction only when the instruction in question renders the entire trial fundamentally unfair.[15] The magistrate judge reasoned that, as the district court was faced with an Allen charge that had been expressly recognized as inherently coercive by both state and federal courts years before, the logical conclusion was that the instant Allen charge rendered Boyd's trial fundamentally unfair.[16]

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[15] See e.g., Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203 (1977) (articulating that burden of demonstrating that erroneous instruction was so prejudicial that it supports a collateral attack on constitutional validity of state court judgment is greater than showing required to establish plain error on direct appeal).

[16] See e.g., Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957 (1965) (holding that charge that said "[y]ou have got to reach a decision in this case" was coercive); see also United States v. Duke, 492 F.2d 693, 697 (5th Cir.1974) (noting that state court's instruction " . . . a decision has to be reached by a jury. You are that jury," was coercive); see also Edwards v. State, 558 S.W.2d 452, 454 n. 1 (Tex.Crim.App.1977) (stating that it was unnecessary for court to address whether court's instructions placed undue duress and pressure on jury, but calling attention to coercive jury instruction given in Duke). The magistrate likened the language in issue – "a decision has to be reached by a jury. You are that jury" – to the coercive supplemental instruction in Jenkins. Of importance, however, is the fact that the Court in Jenkins did not base its opinion that the instruction was coercive on constitutional grounds. Rather, the Court based its decision on its supervisory power over federal courts. See e.g., Lowenfield v. Phelps, 484 U.S. 231, 239 n. 2, 108 S.Ct. 546, 551-52 n. 2, 98 L.Ed.2d 568 (1988) (noting that, as ruling in Jenkins was based

The magistrate judge also found that, as the additional circumstances surrounding the Allen charge increased the likelihood that the jury was coerced, it followed that the Allen charge, plus the additional circumstances, rendered Boyd's trial unfair. This judge considered relevant the facts that (1) the charge was given on the first day of jury deliberations after less than 4 1/2 hours of deliberating; (2) the court gave the instruction after receiving the first note of its kind that the jury was deadlocked; (3) there was no initial direction from the judge to merely continue deliberations; and (4) one hour after hearing the Allen charge, the jury reached a guilty verdict.

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on the Court's supervisory powers, it is not helpful in resolving petitioner's federal habeas claim, which must rise to level of a constitutional violation). The magistrate also relied on Duke, in which the district court gave an Allen charge almost identical to the one given at Boyd's trial. We concluded in Duke that the language used by the district court judge – " . . . a decision has to be reached by a jury . . . You are that jury" – was coercive. We noted that while the charge contained qualifying language that tended to ameliorate the coercive language of the charge, we were unwilling to "speculate on whether the jury was disabused of what it had just been told, which was that a jury was required to reach a decision and it was that jury." Duke, 492 F.2d at 697. We specifically note in response to the magistrate's reliance on Duke, that our role in Duke (a direct appeal) was a supervisory role over the district court, whereas our role in this appeal is to review the charge an issue to determine whether the petitioner's constitutional rights have been violated. Unlike the instant appeal, Duke did not require that we assess the totality of the circumstances to determine whether the Allen charge itself and the surrounding circumstances rendered the entire trial fundamentally unfair.

The magistrate judge bolstered his conclusion that the Allen charge was unconstitutionally coercive by testing his findings under our two-pronged standard used for such determinations.[17] The judge reasoned that, as it was highly likely that the inherently coercive language, used in combination with the surrounding circumstances, coerced the jury into reaching a verdict, it was proper to conclude here that Boyd's jury had been coerced. Based on this conclusion the magistrate judge recommended that Boyd's petition for habeas corpus be granted on the ground that Boyd's trial was fundamentally unfair.

2. Our De Novo Review of the Allen Charge

As we begin our de novo review of the instant Allen charge, we note again that a collateral attack on a state court judgment involving an Allen charge requires us to look at the totality of the circumstances to determine whether a constitutional violation has occurred. At this

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[17] This two-pronged standard considers whether (1) the semantic deviation from approved Allen charges is so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved Allen charge are coercive. See e.g., United States v. Heath, 970 F.2d 1397, 1406 (5th Cir.1992) (reviewing modified Allen charge for compliance with semantic deviation from approved Allen charges, and assessing coerciveness of surrounding circumstances), cert. denied, ___ U.S. ___, 113 S.Ct. 1643, 123 L.Ed.2d 265 (1993); United States v. Lindell, 881 F.2d 1313, 1321 (5th Cir.1989) (same), cert. denied, Kinnear v. United States, 493 U.S. 1087, 110 S.Ct. 1152, 107 L.Ed.2d 1056 (1990) and 496 U.S. 926, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990); United States v. Bottom, 638 F.2d 781, 787 (5th Cir.1981) (same).

level of analysis we consider briefly two habeas cases that establish the basis for our conclusion.

In Lowenfield v. Phelps[18] a habeas petitioner asserted that the conduct of a Louisiana state court – which included an Allen charge plus two separate polls of the jury – coerced the jury into sentencing him to death. The state court gave an Allen charge to the jury before sentencing deliberations commenced. At the same time the court instructed the jury that, pursuant to Louisiana law the court would impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence if the jury did not decide on a penalty. Later, after the jury notified the court that it was unable to reach a decision, the court polled the jurors twice, asking them whether they felt that further deliberations might help them reach a verdict. In addition to polling the jury, the court repeated the instructions it had given to the jurors before they began deliberating. The jury reached a decision within thirty minutes after being polled the second time, and after hearing the second set of instructions from the court.

Lowenfield petitioned the federal court for a writ of habeas corpus, asserting that his constitutional rights had been violated when his deadlocked jury was coerced into reaching a sentence. We denied the petitioner relief, affirming the district court's decision that the conduct of the state court did not render the petitioner's trial

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[18] 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

fundamentally unfair.[19] After granting certiorari, the Supreme Court held that the conduct of the state court – polling the jury and issuing an Allen charge that encouraged jurors to decide the case for themselves but only after discussion and impartial consideration of the case with the other jurors – was not coercive in such a way as to deny the petitioner his constitutional rights.[20]

In Bryan v. Wainwright[21] we reviewed a district court decision that granted federal habeas relief to a state prisoner. In granting the petition the district court found that the state court jury was coerced when that court sua sponte called the jury back into the courtroom (on two separate occasions), and gave an Allen charge and a twenty minute deadline in which to see if the jury court [sic] reach a verdict.[22] On appeal, we determined that the

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[19] Lowenfield v. Phelps, 817 F.2d 285, 293 (5th Cir.1987), aff'd, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). We agreed with the district court that a review of record did not demonstrate that the jury instruction was coercive to the extent that the trial was rendered fundamentally unfair. We noted that the jury had deliberated nine and one-half hours before reaching a verdict in the penalty phase, reasoning that this length of time supported our conclusion that the jury was not coerced into reaching a sentence

[20] Lowenfield, 484 U.S. at 240-41, 108 S.Ct. at 552-53.

[21] 511 F.2d 644 (5th Cir.1975), cert. denied, 423 U.S. 837, 96 S.Ct. 63, 46 L.Ed.2d 55 (1975).

[22] Id. at 645. The jury had been deliberating for five and one-half hours when the court called them back to the courtroom sua sponte to determine whether they were close to a verdict. Upon learning that the jury was not close to a verdict the court gave the jury an Allen charge and dismissed them to continue deliberating. One-half hour later the court called the jury back into the court room and asked if the jury believed that

comments of the judge were not so prejudicial as to make the petitioner's trial fundamentally unfair. We held that the coercive effect, if any, of the state trial procedure did not reach constitutional proportions, and we reversed the district court's decisions with instructions to deny the petition for writ of habeas corpus.[23]

Relying on the facts of Lowenfield and Bryan as indicative of the degree of coercion necessary to support a writ of habeas corpus, we are convinced that the instant Allen charge does not rise to the level of a constitutional violation and thus cannot support a petition for habeas corpus. Stated differently, we are not convinced that Boyd's Allen charge unconstitutionally coerced this jury

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they could arrive at a verdict in a short period of time. The court then gave the jury an additional twenty minutes and told the jury "we'll see if you can arrive at a verdict within the next twenty minutes." Within seventeen minutes the jury returned with a guilty verdict. Id. On appeal, the district court determined that a "coercive atmosphere was created in which the jury was forced to deliberate to verdict." Id. at 646, quoting Bryan v. Wainwright, 377 F.Supp. 766, 769 (M.D.Fla.1974), rev'd 511 F.2d 644 (5th Cir.1975), cert. denied, 423 U.S. 837, 96 S.Ct. 63, 46 L.Ed.2d 55 (1975). The court concluded that the total coercive effect deprived the petitioner of his constitutional rights of due process under the Fifth and Fourteenth Amendments, thereby requiring the court to grant the petitioner's writ of habeas corpus. Id. We reversed the district court on appeal, concluding that the level of coercion, if any, did not rise to the level of a constitutional violation.

[23] Id. at 646. In reversing the district court in Bryan, we noted specifically that the district court relied on direct appeal cases in which the coercive effect of the facts did not have to rise to the constitutional level of deprivation of due process to merit relief. Id.

into reaching a verdict. We disagree, however, with the magistrate judge's determination that, standing alone, the Allen charge was coercive in that it essentially told the jury that it had to reach a verdict. Admittedly, the state court did say that "a decision has to be reached by a jury," and "you are that jury." We note, however, that the court also instructed the jury that (1) it should "endeavor to reach an agreement if at all possible," (2) it "ought to make every effort to arrive at a unanimous verdict," (3) the "verdict must be the verdict of each individual juror and not mere acquiescence," (4) it has the "duty to decide the case if you can conscientiously do so," and (5) it should return to the jury room and "endeavor to agree upon a verdict." Looking at the entire text of the charge, in the full context of the case, we are convinced that the instruction did more to encourage the jurors to reach a verdict than it did to coerce them. Thus, we conclude that the phrase "you are that jury" was not unconstitutionally coercive; in the totality of the circumstances we do not believe that that phrase forced the jury to reach a verdict.

In addition, after reviewing the additional circumstances surrounding the charge, we are even more firmly convinced that any coerciveness generated by the court's instruction fell short of the level of a constitutional violation. The jury deliberated between 4 1/2 and 5 hours before it notified the court that it was deadlocked. Only after hearing that the jury was deadlocked did the court read the Allen charge and encourage the jury to continue deliberating. Approximately one hour and twenty minutes after hearing that charge the jury returned with its verdict. Clearly, having determined in Bryan that the court's conduct of spontaneously summoning the jury,

giving an Allen charge before being notified that the jury was deadlocked, and imposing a quick "turn-around" deadline in which to try to reach a verdict, did not render a trial fundamentally unfair, we cannot now hold unconstitutionally coercive the instant situation in which (1) the jury deliberated for approximately the same amount of time as the Bryan jury before notifying the court that it was deadlocked, and (2) the court gave no apparent deadline or otherwise pressured the jury to reach a verdict.

Similarly, as we concluded in Lowenfield that there was no unconstitutional coercion when the court twice polled the jury, reiterated a supplemental jury charge, and told the jurors that if they failed to determine a penalty the court would impose its own sentence, it must follow here, under palpably less egregious circumstances, that there is no unconstitutional coercion. When we review all the factors together we are convinced that Boyd's jury was not unconstitutionally coerced into reaching a verdict. We conclude, therefore, that the district court erred in granting Boyd's petition for habeas corpus based on its finding that the Allen charge given by the state court rendered Boyd's trial fundamentally unfair.

III

CONCLUSION

Federal habeas corpus will not lie unless an error was so gross or a trial was so fundamentally unfair that the petitioner's constitutional rights were violated. In determining whether an error was so extreme or a trial was so

fundamentally unfair we review the putative error at issue, looking at the totality of the circumstances surrounding that error for a violation of the petitioner's constitutional rights.

Although previous direct appeal cases have held that Allen charges similar (and almost identical) to Boyd's Allen charge were coercive, prior federal habeas cases have held that similar Allen charges accompanied by more egregious circumstances did not merit relief. We conclude, therefore, after reviewing the instant Allen charge in its full context, and in conjunction with the totality of the circumstances surrounding the charge, that the district court erred in determining that the Allen charge given at Boyd's state court trial rendered the trial fundamentally unfair, requiring that court to grant Boyd's petition for habeas corpus relief and vacate his sentence. Thus, we reverse the district court order granting Boyd's writ of habeas corpus and remand this case to that court for the purpose of dismissing Boyd's habeas petition.

REVERSED AND REMANDED.

REYNALDO G. GARZA, Circuit Judge dissenting.

I respectfully dissent because I have always felt that the type of Allen charge given by the state district judge in this criminal case was coercive and deprived Boyd of a fair trial. I would therefore affirm the district court's granting of a new trial.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL J. BOYD, Petitioner, V. JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§ § § § § § § § §	CIVIL NO. SA-92-CA-0497

MEMORANDUM AND RECOMMENDATION

(Filed Nov. 13, 1992)

Petitioner Michael J. Boyd has filed this habeas corpus action pursuant to Title 28 U.S.C. Section 2254 challenging his February, 1987 state court conviction on a charge of aggravated sexual assault. Petitioner's sole ground for relief is an argument that the state trial court erred in giving a modified *Allen* charge to the jury after jurors initially indicated that they were unable to reach a unanimous verdict. The respondent has filed a motion for summary judgment. For the reasons set forth below, the recommendation is that petitioner's application for habeas corpus relief be granted and that his state court conviction be vacated.

Statement of the Case

Petitioner was charged in state court with aggravated sexual assault. On February 13, 1987, a jury in state district court found petitioner guilty of that offense.

However, prior to the rendition of its verdict, the jury sent out a note which read as follows: "Judge Butler, it is with deep regret that we, the jury, cannot reach a unanimous decision in this case. Thank you. Elena Oviedo, foreman."[1] In response to that note, the state trial judge gave the jury a supplemental instruction along the lines of that approved by the Supreme Court in *Allen v. United States*.[2] The state trial court included the following language in its *Allen* charge:

> MEMBERS OF THE JURY:
>
> In response to the information you have given me, I give you the following instructions, and I want you to pay close attention to what I tell you:
>
> You should endeavor to reach an agreement if at all possible. Some jury, sometime, will have to decide this question.
>
> *The issue has been tried very ably by both sides, who have presented this evidence to you, and a decision has to be reached by a jury. You are that jury, and it seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion.*
>
> Of course, the verdict of the jury should represent the opinion of each individual juror, but that does not mean that the opinion may not be changed for a conference in the jury room.

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[1] See Statement of Facts from petitioner's state court trial, Volume IV of V, at pp. 743 & 746.

[2] 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896).

The very object of the jury system is to secure unanimity by comparison of views and by argument among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors, and with a distrust of his own judgment if he finds the large majority of the jury takes a different view of the case from what he himself takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment, or that he should close his ears to the arguments of other jurors who are equally honest and intelligent as himself.

Accordingly, although your verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you, however, that you should examine what has been submitted to you with an open mind, and with candor and with proper regard and deference to the opinion of each other.

It is your duty to decide the case if you can conscientiously do so.

You should listen to each other's argument with a disposition to be convinced. If much the larger number favor one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error as to his views.

I want you to go back to the jury room and continue your deliberations. Discuss the matter among yourselves in a friendly spirit and endeavor to agree upon a verdict.

These are the instructions of the Court.[3]

The jury began deliberations at 9:55 a.m. and the state court gave that *Allen* charge a little after 4 p.m. on the jury's first day of deliberations on the guilt and innocence phase of petitioner's trial.[4] At approximately 5:20 p.m. that same afternoon, the jury returned with a unanimous verdict of guilty.[5] The jury subsequently assessed punishment, based upon petitioner's prior felony conviction for theft, at life imprisonment.

Boyd appealed. The Texas Court of Appeals for the Fourth Supreme Judicial District affirmed petitioner's conviction and sentence in an unpublished opinion dated February 17, 1988.[6] The Texas Court of Criminal Appeals refused petitioner's petition for discretionary review on April 27, 1988. According to respondent, petitioner filed an application for state habeas relief which was dismissed without prejudice by the Texas Court of Criminal appeals on October 31, 1990.[7]

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[3] See Statement of Facts from petitioner's trial at Volume IV of V at pp. 746-49, and Transcript from petitioner's trial at pp. 89-90.

[4] See Transcript from petitioner's trial at p. 12.

[5] Id.

[6] *See Boyd v. State*, Case No. 04-87-00139-CR (Tex. App. – San Antonio February 17, 1988).

[7] Respondent failed to include any of the state court records related to petitioner's state habeas proceeding among the state court records submitted in this cause. Therefore, Court is unable to verify any of the allegations, concerning that proceeding, contained in respondent's answer and motion for summary judgment.

On May 13, 1992, petitioner filed his application for habeas relief in this Court, presenting his sole ground for relief.[8] Respondent filed his answer and motion for summary judgment on July 20, 1992.[9] On September 17, 1992, petitioner filed a response to respondent's answer in which petitioner argued that the modified *Allen* charge given by the state trial court in his case violated his constitutional rights.[10] In an Order dated October 8, 1992, this Court directed respondent to file a complete copy of the Texas Court of Appeals' opinion affirming petitioner's conviction, explained the problem posed by petitioner's sole ground for relief, and gave the parties until October 30 to file additional briefs on the sole legal issue before the Court.[11] On November 3, 1992, respondent filed its supplemental answer, in which it argued that the giving of the admittedly defective *Allen* charge in question did not violate petitioner's constitutional rights.[12]

Analysis and Authorities

Although petitioner argues that the *Allen* charge violated state law, only federal constitutional issues are relevant to this Section 2254 proceeding.[13] Respondent asserts that even if submission of the *Allen* charge was error, it was not a constitutional violation. In a collateral

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[8] See docket entry no. 3.

[9] See docket entry no. 6.

[10] See docket entry no. 12.

[11] See docket entry no. 13.

[12] See docket entry no. 16.

[13] *Dupuy v. Butler*, 837 F.2d 699, 701 n.7 (5th Cir. 1988).

proceeding, the question is not whether the instruction is undesirable, erroneous or even universally condemned, but whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.[14] The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing to establish plain error on direct appeal.[15] Liberally construed, petitioner asserts: (1) that the submission of the *Allen* charge, in any form, was error, (2) that the *Allen* charge suggested that those jurors in the minority vote with the majority, and (3) that the language underlined above coerced a guilty verdict.

The Fifth Circuit first expressly approved the use of *Allen* charges in *United States v. Bailey*[16] and has consistently upheld the use of modified *Allen* charges that are not coercive in nature.[17] Thus, the mere use of an *Allen*

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[14] *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1737, 52 L.Ed.2d 203 (1977), *quoting Cupp v. Naughten*, 414 U.S. 141, 146, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1974).

[15] *Henderson*, 431 U.S. at 154, 97 S.Ct. at 1736.

[16] 480 F.2d 518 (5th Cir. 1973) (*en banc*). The specific language of the modified *Allen* charge approved in *Bailey* appears in the panel opinion in that case. *See United States v. Bailey*, 468 F.2d 652, 657 n.5 (5th Cir. 1972).

[17] *See United States v. Kelly*, 783 F.2d 575, 576-77 (5th Cir.), *cert. denied*, 479 U.S. 889 (1986); *United States v. Gordon*, 780 F.2d 1165, 1177 (5th Cir. 1986); *United States v. Kimmel*, 777 F.2d 290, 294-95 (5th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *United States v. Nichols*, 750 F.2d 1260, 1266 (5th Cir. 1985); *United States v. Jennings*, 724 F.2d 436, 447 (5th Cir.), *cert. denied*, 467 U.S. 1227 (1984); *United States v. Anderton*, 679 F.2d 1199, 1203-04 (5th Cir.

charge is not a constitutional violation. However, more than a decade prior to petitioner's trial, the Fifth Circuit held that the almost identical language emphasized above from the *Allen* charge given in petitioner's trial was sufficient to render an otherwise permissible modified *Allen* charge erroneous.[18] Furthermore, the Texas Court of Criminal Appeals called this same language to the attention of Texas judges in a footnote in one of its 1977 opinions.[19] Thus the defect in the language quoted above from the *Allen* charge used in petitioner's trial was made evident to both state and federal trial courts long before petitioner's trial commenced.[20]

In its Order dated October 8, the Court called these facts to the attention of the parties and gave them an opportunity to respond to the issue of whether the state trial court's use of the proscribed language quoted above

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1982); *United States v. LaRiche*, 549 F.2d 1088, 1092-93 (5th Cir.), *cert. denied*, 430 U.S. 987 (1977); *United States v. McCray*, 528 F.2d 1029, 1031 (5th Cir. 1976); *United States v. Cherami*, 520 F.2d 325, 331 (5th Cir. 1975); *United States v. Amaya*, 509 F.2d 8, 10-12 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101 (1977); and *United States v. Fonseca*, 490 F.2d 464, 471 (5th Cir.), *cert. denied*, 419 U.S. 1072 (1974).

[18] *See United States v. Duke*, 492 F.2d 693, 697 (5th Cir. 1974).

[19] *See Edwards v. State*, 558 S.W.2d 452, 454 n.1 (Tex. Crim. App. 1977).

[20] It should be noted that petitioner did not object at trial to the language found erroneous in *United States v. Duke*. However, the State, perhaps because it is not clear that the Texas Court of Appeals relied upon procedural default, did not raise procedural bar as an issue. Therefore, petitioner's failure to object does not preclude consideration of the defective language. *See United States v. Drobny*, 955 F.2d 990, 994-95 (5th Cir. 1992).

in its *Allen* charge could be justified. In response, respondent has offered the general rule that a federal court will reverse a state court criminal conviction based upon erroneous jury instructions only when the instructions in question render the entire trial fundamentally unfair. While the Court agrees that this rule provides the appropriate standard for evaluating the propriety of jury instructions generally,[21] in this case we are faced with an *Allen* charge that was expressly and specifically recognized as inherently coercive by both the state and federal courts years before petitioner's trial.

Respondent also cites the Fifth Circuit's opinion in *Bryan v. Wainwright*[22] in support of his argument that the error committed by the state trial court in connection with petitioner's *Allen* charge does not rise to the level of a constitutional violation. In that case, the Fifth Circuit held that a state trial court's use of an *Allen* charge and a subsequent instruction giving the jury twenty minutes to reach a verdict were not so coercive as to rise to the level of a constitutional violation.[23] The Court held that unless the error was so gross or the trial fundamentally unfair, habeas corpus would not lie to correct erroneous jury instructions.[24] However, at no time in *Bryan* did the estate court instruct the jury that it *had* to reach a verdict.

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[21] It must be noted that neither *Henderson v. Kibbe, supra,* nor *Cupp v. Naughten, supra,* involved *Allen* charges.

[22] 511 F.2d 644 (5th Cir.), *cert. denied,* 423 U.S. 837 (1975).

[23] 511 F.2d at 646.

[24] *Id.*

Likewise, the other case directly dealing with a *Allen* charge cited by respondent in his supplemental answer, *Johnson v. Dugger*[25], also did *not* involve an *Allen* charge that *required* the jury to render a verdict. On the contrary, state trial court judge in *Johnson* took great pains in his *Allen* charge to advise the jury that he could *not* compel them to reach a unanimous verdict and that he would declare a mistrial if further deliberations proved unsuccessful.[26]

The instruction in this case that "a decision has to be reached by a jury. You are that jury . . . " is no different in effect from an instruction that, "You have got to reach a decision in this case." The latter instruction was found to be coercive and resulted in a reversal of the conviction in *Jenkins v. United States*.[27] In petitioner's case, the trial judge did give certain instructions which tended to ameliorate the coercive language. He stated, "You should endeavor to reach an agreement if at all possible. Some jury, sometime, will have to decide this question." However, in *United States v. Duke*, the Fifth Circuit considered ameliorative language but was "unwilling to speculate on whether the jury was disabused of what it had just been told. . . . "[28]

Other circumstances surrounding the giving of the *Allen* charge in petitioner's case increase the likelihood

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[25] 817 F.2d 726 (11th Cir. 1987).

[26] *See Johnson v. Dugger*, 817 F.2d at 730.

[27] 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957 (1965).

[28] 492 F.2d at 697.

that the jury was coerced by the instruction. The record reveals that the jury was given the case a little before 10:00 a.m., deliberated until lunch, then returned to deliberate in the afternoon.[29] At approximately 4:00 p.m., it sent out its note indicating that it was unable to each a unanimous decision. Within minutes, the trial judge called the jury back into the courtroom, gave the erroneous *Allen* charge and sent the jury back to deliberate. About 5:15 p.m., the jury returned its verdict of guilty.

The Fifth Circuit has established a two-pronged test for determining the propriety of a particular *Allen* charge: (1) the semantic deviation from approved *Allen* charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved *Allen* charge must not be coercive.[30] In this case, the language quoted above from the state trial court's *Allen* charge not only deviates from the language used in approved *Allen* charges, but uses the same language that the Fifth Circuit specifically rejected more than a decade prior to petitioner's trial in *United States v. Duke*.[31] Thus, the *Allen* charge fails the first prong of the Fifth Circuit's test for the propriety of such charges.

Furthermore, given the circumstances surrounding the giving of the *Allen* charge during petitioner's trial, it is highly likely that the inherently coercive nature of the

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[29] See Transcript from petitioner's trial, at p. 12.

[30] *See United States v. Heath*, 970 F.2d 1397, 1406 (5th Cir. 1992); *United States v. Lindell*, 881 F.2d 1313, 1321 (5th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990); and *United States v. Bottom*, 638 F.2d 781, 787 (5th Cir. 1981).

[31] 492 F.2d 693, 697 (5th Cir. 1974).

language in question impacted the jury. The *Allen* charge was given the first day of deliberations after less than 4½ hours of deliberation. The deadlock note was the first note of its kind from the jury and the *Allen* charge was the trial court's first response. There was no initial direction to merely continue deliberations. Approximately one hour after the *Allen* charge was read, a guilty verdict was returned.[32] The Court concludes that the giving of the *Allen* charge in petitioner's case rendered his trial fundamentally unfair.[33]

Recommendation

For the reasons set forth above, it is recommended that petitioner's petition for habeas corpus relief be GRANTED and that petitioner's state court conviction be VACATED.

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[32] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 462, 98 S.Ct. 2864, 2886, 57 L.Ed.2d 854 (1978) (swift resolution in the face of a prior indication of deadlock raises serious questions regarding the coerciveness of an instruction).

[33] Although unnecessary to resolution of this case, evaluation of the *Allen* charge, as regards petitioner's objection that it instructed the minority jurors to vote with the majority, suggests no constitutional violation. The charge directed the jurors to listen to each other's arguments and keep an open mind. The jury was instructed to decide the case "if you can conscientiously do so." There is no indication that the charge, to the extent it concerned the vote of the minority jurors, coerced the jurors for acquittal to vote for conviction.

Instructions for Service and
Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within ten (10) days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the Magistrate Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court.[34] Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are

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[34] *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982), *see Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985).

accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice.[35]

DATED, this 13th day of November, 1992.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES
MAGISTRATE JUDGE

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[35] *Nettles*, 677 F.2d at 410.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL J. BOYD, Petitioner, v. JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	*	CIVIL NO. SA-92-CA-0497

MEMORANDUM AND RECOMMENDATION

(Filed Mar. 16, 1993)

On November 13, 1992, the undersigned entered a Memorandum and Recommendation, finding that the *Allen* charge given to the jury at petitioner's state court trial was constitutionally erroneous, and recommending that petitioner's application for habeas relief be granted. In his objections to the recommendation, respondent contested this finding and, for the first time, contended that petitioner had not objected to the disputed language in the *Allen* charge at trial and was, thus, barred from presenting this claim now because of this procedural default. (Docket no. 22). Petitioner argues that respondent has forfeited the procedural default defense by raising it after the Memorandum and Recommendation and, alternatively, that the failure to object at trial does not preclude consideration of the issue now. (Docket nos. 23 and 26). Having considered the pleadings, the state court

records and the argument of counsel, the court is of the opinion that petitioner's claim is not barred by procedural default.

It is undisputed that petitioner's counsel did not object at trial to the language in the *Allen* charge which formed the basis for this Court's decision to recommend that petitioner be granted habeas relief. However, the mere existence of a basis for a state procedural bar does not deprive a federal court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985). When a state-court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court will presume that there is no independent and adequate state court ground for the state court decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *Smith v. Collins*, 977 F.2d 951, 955 (5th Cir. 1992). Thus, procedural default does not bar consideration of a federal claim unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). *See Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2553-59, 115 L.Ed.2d 640 (1991).

The Court does not believe that the delay in the State's presentation of the procedural default defense precludes its consideration. The defense can be waived if it is not presented in the district court. *Washington v.*

Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982). However, such a waiver can be averted by the State if the procedural default issue is raised at any point in the district court proceeding. *Wiggins v. Procunier*, 753 F.2d 1318, 1321 (5th Cir. 1985). Raising the issue for the first time in objections to the magistrate judge's recommendation is timely. *Young v. Herring*, 777 F.2d 198, 204 (5th Cir. 1985).

On direct appeal petitioner did complain of the language at issue. The Court of Appeals stated:

> Defense counsel objected to specific language in the charge, but not to the language complained of on appeal. To preserve error a trial objection to the charge must distinctly specify each ground of objection. . . . Objections to the charge must be made before it is read to the jury, and must specify every ground of objection. . . . The error asserting improper instruction is based on a claim which was not presented as a timely objection to the trial court's charge. . . . Given the objection made on appeal, the court would have had an opportunity to delete the complained of language.

The Court of Appeals then addressed the merits of the issue and, relying on federal precedents, held that the language did not have a coercive effect.[1] The State contends that the Court of Appeals' language, quoted above,

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[1] Interestingly, the appellate court, in reaching this holding, relied upon other language in the *Allen* charge that "some jury, sometime, will have to decide this question." In *United States v. Harris*, 391 F.2d 348, 355 (6th Cir.), *cert. denied*, 393 U.S. 874 (1968), the Court of Appeals held that similar language was itself coercive and was an unauthorized extension of the *Allen* charge.

constitutes a clear and express statement of the appellate court's intent to rely on procedural default. This Court does not agree. The Court of Appeals cited state law which indicates the necessity for objection but it never clearly and expressly held that consideration of petitioner's *Allen* charge challenge was precluded by procedural default.

The situation is very similar to *Harris v. Reed*, in which the state appellate court referred to "well-settled" principles of state law that "those issues which could have been presented [on direct appeal], but were not, are considered waived." *Harris v. Reed*, 489 U.S. at 258, 109 S.Ct. at 1040. The appellate court found that petitioner's allegation "could have been raised in [his] direct appeal" but went on to consider and reject the claim on its merits. *Id.* The Supreme Court concluded that the state appellate court did not clearly and expressly rely on waiver as a ground for rejecting petitioner's claim. *Id.* at 266, 109 S.Ct. at 1045.

> To be sure, the state court perhaps laid the foundation for such a holding by stating that most of petitioner's allegations 'could have been raised [on] direct appeal.' Nonetheless, . . . this statement falls short of an explicit reliance on a state-law ground.

Id.

The opinion in the case at bar also laid the foundation for a finding of procedural default. It noted petitioner's failure to object at trial to the challenged language and cited Texas law requiring such an objection. The opinion also observed that had the objection been made, the trial court could have deleted the offensive

language. However, the state appellate court did not explicitly rely on procedural default. The reference to state law in the opinion is insufficient to demonstrate clearly whether the court intended to invoke waiver. *Harris v. Reed* 489 U.S. at 266 n.13, 109 S.Ct. at 1045 n.13.

The court considered and rejected the merits of petitioner's claim. The State correctly observes that when a state court bases its decision upon the alternative grounds of procedural default and a rejection of the merits, a federal court must, in the absence of good cause and prejudice, deny habeas relief because of the procedural default. *Harris v. Reed,* 489 U.S. at 264 n.10, 109 S.Ct. at 1044 n.10. *Cook v. Lynaugh,* 821 F.2d 1072, 1077 (5th Cir. 1987). However, in this case, the state appellate court did not clearly and expressly base its decision upon procedural default. While it perhaps could be argued that the language in the state court's opinion would have sufficed had the state court never reached the federal claim, the state court, as in *Harris v. Reed,* clearly went on to reject the federal claim on the merits. 489 U.S. at 266 n.13, 109 S.Ct. at 1045 n.13. Thus, an ambiguity exists as to the basis for the state court decision which permits federal review of the *Allen* charge issue.

Even if the state court had relied on procedural default, this Court would not be precluded from considering petitioner's *Allen* charge claim. If procedural default applies, then a habeas petitioner cannot prevail in federal court absent a showing of cause for the procedural default and prejudice from the error which has been defaulted. *Sawyer v. Whitley,* ___ U.S. ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992). The existence of cause must ordinarily turn on whether the petitioner can show

that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). *Smith,* 977 F.2d at 956. Even without cause and prejudice, a procedurally defaulted claim can be considered if the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman,* ___ U.S. at ___, 111 S.Ct. at 2565. Such a miscarriage of justice would occur if the failure to consider the defaulted claim would probably result in the conviction of one who is actually, as opposed to legally, innocent. *Murray,* 477 U.S. at 496, 106 S.Ct. at 2649.

Petitioner does not contend and the Court can find no basis for a finding that the failure to consider petitioner's claim would result in a fundamental miscarriage of justice. However, cause and prejudice, sufficient to defeat procedural default, do exist. As cause, petitioner asserts the ineffectiveness of his attorney in failing to object to the charge. Ineffective assistance of counsel, in a proceeding in which the defendant is constitutionally entitled to counsel, can constitute cause for procedural default. *Murray v. Carrier,* 477 U.S. at 488, 106 S.Ct. at 2645. *Wiley v. Puckett,* 969 F.2d 86, 101 (5th Cir. 1992).[2] The

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[2] As when ineffective assistance is itself a ground for habeas relief, a petitioner asserting such a claim as cause for procedural default must first exhaust available state remedies. *Murray v. Carrier,* 477 U.S. at 488-89, 106 S.Ct. 2646. Petitioner did allege, in his most recent state habeas petition, ineffective assistance by his trial counsel. He did not specifically assert that the failure to object to the *Allen* charge was ineffective; however, the State has not raised failure-to-exhaust as a defense to this claim of ineffective assistance. Therefore, it can be considered.

petitioner must show that counsel's performance was deficient and that it prejudiced petitioner's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The Court believes that the failure of petitioner's trial counsel to object to the challenged language in the *Allen* charge was deficient performance. The previous Memorandum and Recommendation discusses the fact that the same language which appears in petitioner's *Allen* charge was held to be erroneous by both state and federal courts 10 years before petitioner's February, 1987 trial. The State, in this case, acknowledges that the language has been "expressly disapproved." As noted in the Order of January 25, 1993, this Court has already held, in the previous Memorandum and Recommendation, that petitioner was prejudiced by the use of the offending language. Trial counsel was ineffective as regards submission of the *Allen* charge, thus cause for procedural default has been shown. The existence of cause and prejudice permits consideration of the *Allen* charge issue, despite procedural default.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that the State's procedural default defense be rejected.

See Schouest v. Whitley, 927 F.2d 205, 209 n.4 (5th Cir. 1991). In any event, the state court's rejection of the *Allen* charge claim on its merits makes exhaustion of the ineffective assistance claim futile. *See Deters v. Collins*, No. 91-6066, 1993 WL 46564 at *8 n.16 (5th Cir. March 11, 1993).

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. *Such party shall file the objections with the clerk of the court, and serve the objections on the Magistrate Judge and on all other parties.* A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court. *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982). *See Thomas v. Am*, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by

the District Court, except upon grounds of plain error or manifest injustice. *Nettles*, 677 F.2d at 410.

SIGNED this 16th day of March, 1993.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL J. BOYD,	*	
	*	
Petitioner,	*	
	*	
v.	*	SA-92-CA-497
	*	
JAMES A. COLLINS, *et al.*,	*	
	*	
Respondent.	*	

ORDER

(Filed Jul. 27, 1993)

On this day came on to be considered by the Court the petition for writ of habeas corpus filed by petitioner pursuant to 28 U.S.C. § 2254. Also under consideration by the Court are the Memoranda and Recommendations of United States Magistrate John W. Primomo, to which objections have been filed. After having carefully reviewed the record and having made a *de novo* determination as to those matters to which petitioner objects, the court hereby ADOPTS the Magistrate Judge's Memoranda and Recommendations.

It is therefore ORDERED that the petitioner's application for writ of habeas corpus be and hereby is GRANTED. Petitioner's state court conviction is hereby VACATED.

So ORDERED this 27th day of July, 1993.

/s/ H. F. Garcia
H. F. Garcia
United States District Judge

E-1

Court of Appeals
Fourth Supreme Judicial District of Texas
San Antonio

****

OPINION

Appeal No. 04-87-00139-CR

Michael J. BOYD,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the 226th District Court of Bexar County
Trial Court No. 86-CR-3935-A
Honorable Ted Butler, Judge Presiding

Opinion by: Shirley W. Butts, Associate Justice

Sitting: Shirley W. Butts, Associate Justice
Antonio G. Cantu, Associate Justice
Blair Reeves, Associate Justice

Delivered and filed: February 17, 1988

AFFIRMED

Appellant was tried by a jury and found guilty of the offense of aggravated sexual assault as a repeat offender. Punishment was assessed at life imprisonment.

Four points of error are raised: First, the erroneously admitted hearsay testimony of a police officer constituting "outcry" went beyond the mere fact that a sexual assault occurred. Second, the trial court erroneously denied appellant's motion for mistrial after the prosecutor injected new and harmful facts unsupported by the record. Third, the trial court erred in giving an *Allen*

charge to the jury after it announced it was unable to render a unanimous verdict. Fourth, the trial court erred in not charging the jury on the law of parole pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a).

The complainant was assaulted as she approached the restroom of an Exxon gas station in San Antonio. The attacker displayed a gun, ripped her clothes, raped her and beat her, then escaped in an automobile with another person. Appellant was arrested shortly thereafter and identified by complainant as the one who assaulted her: In addition, blood found on appellant's shirt matched the blood type of the complainant.

Appellant first argues that the "outcry" testimony went beyond the mere fact a complaint was made. The evidence showed that Officer Noah Hernandez of the San Antonio Police Department responded to a call of a "rape in progress" on August 14, 1986. When he arrived, blood was still "flowing freely" from cuts on complainant's face. Hernandez testified he arrived eight or nine minutes after the dispatch. He stated the complainant was "almost" in shock and hysterical but responded to his questions.

The initial objection to *any* testimony regarding these statements was overruled on the basis that the initial complaint was admissible as outcry. *King v. State*, 631 S.W.2d 486, 491 (Tex. Crim. App. 1982), *cert. denied*, 459 U.S. 928, 103 S. Ct. 238, 74 L. Ed. 188. After the objection was overruled, the State continued:

> Q: Officer, once again, I repeat, what did she say to you?

A: She reported to me that she had just been raped and beaten.

Q: Did she say anything else to you?

A: No, sir.

Q: Was she able to give you a physical description of any suspect?

A: Yes, sir.

Q: Can you tell up the description that she gave you?

A: She had just been raped and beaten by a Negro male.

Q: Can you tell us, did she give you any heights, weights, dimensions, if any?

A: A Negro male, dark complexion, slender build, a goatee.

Q: Anything else?

A: And collar-length Afro style cut.

Q: Anything else Officer?

A: No, sir.

Q: Did she say anything about how she was raped?

A: She was forced to go behind –

[Defense Counsel]: Objection, Your Honor, this is hearsay . . .

The objection was sustained.

To be timely, an objection must be made as soon as the reason for objection becomes apparent. *Thompson v.*

State, 691 S.W.2d 627, 635 (Tex. Crim. App. 1984), *cert. denied,* 474 U.S. 865. The objection here went to any details of the rape related to Hernandez by complainant. That objection was sustained, and appellant received the relief he requested.

The objection following reference to "forced to go behind . . . " and was not directed immediately to the description testimony. *See Thompson v. State, supra,* at 635. Moreover, appellant was not identified; rather, a description was given. *Compare, Vera v. State,* 709 S.W.2d 681 (Tex. App. – San Antonio 1986, pet. ref'd.).

In addition, although the prosecutor may have stated there was no reliance on *res gestae* as the basis for admission of the description testimony, this court is not bound by that assertion. Complainant was in hysterics and was calmed down by the officer enough to describe her assailant. Her statements were made within minutes of the rape. Therefore, if the description of the attacker was not part of the "bare facts of the complaint," it was part of the *res gestae* of the offense. It is notable that when EMS officers treated the complainant, she began screaming and displayed marked hysterics. She was lying in the ambulance when officers brought appellant before her for identification purposes.

Testimony of a witness, who relates statements as told to him by a rape victim within a very short period after the offense occurred, is admissible on the grounds that such statements are either "confined to the bare facts of the complaint" or "res gestae" of the offense. *Hanner v. State,* 572 S.W.2d 702, 706 (Tex. Crim. App. 1978), *cert. denied,* 440 U.S. 961. The first point of error is overruled.

Appellant next complains the prosecutor injected into the case new and harmful facts, unsupported by the record, specifically: that potential witness Bolden had not testified because she was hospitalized. Complainant testified that she was with two others, Felicia Mayo and Annette Bolden, at the Exxon station where she was attacked. Mayo testified as a State's witness. Bolden did not, and her absence was not accounted for during the evidentiary portion of the trial.

In argument, appellant's counsel referred to Bolden's absence, suggesting that possibly she was not called because "she is not going to go along with [complainant] . . . [and] Felicia." The State did not object. In rebuttal, however, the prosecutor stated to the jury "Mr. Angelini asked where's Annette Bolden. She's in the hospital. That's where she is." Appellant's objection that this was outside the record was sustained. The jury was instructed to disregard, but appellant's motion for mistrial was overruled.

Even if a prosecutor's comment in final argument is improper, an instruction to disregard will usually be sufficient to cure the error. *Logan v. State*, 698 S.W.2d 680, 683 (Tex. Crim. App. 1985). The error will not be cured only in "extreme cases in which the new evidence is of an obviously harmful nature or the the [sic] argument is so inflammatory that its harmful effects may not be cured by instruction." *Pimentel v. State*, 710 S.W.2d 764, 774 (Tex. App. – San Antonio 1986, pet. ref'd).

Appellant argues that in this case the prosecuting attorney made use of jury argument to get before the jury evidence which is outside the record. Appellant argues

that this is the unsworn testimony of the attorney and amounts to error. *Jordan v. State*, 646 S.W.2d 946, 948 (Tex. Crim. App. 1983).

He relies on several cases which may be distinguished. In *McNaulty v. State*, 135 S.W.2d 987 (Tex. Crim. App. 1939), the prosecutor argued that the State "could have put on many more witnesses that would have testified to the same facts that the witnesses testified to that we did put on." *Id.* at 989. In another case, the prosecutor erred in arguing it could have subpoenaed a "long list of witnesses . . . from whom he could have proved the good reputation of deceased, but didn't think it necessary." *Dowd v. State*, 284 S.W. 592, 593 (Tex. Crim. App. 1926). The prosecutor's argument that there were other witnesses adverse to the defendant but who had not yet testified was clearly error in *Johnson v. State*, 649 S.W.2d 111, 116 (Tex. App. – San Antonio (1983), *aff'd*, 662 S.W.2d 368 (Tex. Crim. App. 1984). In the case at hand, the prosecutor offered no comment as to what the probable testimony of the missing witness might be. We cannot agree with appellant's contention that the prosecutor's remark that witness Bolden was in the hospital was calculated to inflame the minds of the jury. Neither do we find it to be harmful or prejudicial to appellant. While the prosecutor may have erred in going outside the record, we do not find the error harmful. The error was cured by the court's instruction to disregard. *Logan, supra*, at 682; *Pimentel, supra*, at 774. The motion for mistrial was correctly overruled. The second point of error is overruled.

In his third point, appellant asserts that the trial court erred in giving the so-called *Allen* charge after the jury announced it was unable to render a unanimous

verdict. The jury heard three days of evidence in this case and began deliberations on the morning of the fourth day. After about five hours of deliberations, the jury foreman sent the judge the following note: "It is with deep regret we, the jury, cannot reach a unanimous decision in this case." After receiving this note the trial court gave the jury the following additional charge:

> Members of the jury, in response to the information you have given me, I give you the following instructions. And I want you to pay close attention to what I tell you.
>
> You should endeavor to reach an agreement if at all possible. Some jury at some time will have to decide this question.
>
> This issue has been tried out very ably by both sides, who have presented this evidence to you and the decision has to be reached by a jury.
>
> You are that jury. And it seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion.
>
> Of course, the verdict of the jury should represent the opinion of each individual juror. But that does not mean that the opinion may not be changed by a conference in the jury room.
>
> The very object of the jury system is to secure unanimity by comparison of views and by argument among the jurors, themselves. Each juror should listen with deference to the arguments of the other jurors and with a distrust of his own judgment if he finds that a large majority of the jury takes a different view of the case from what he, himself, takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment, or that he should close his ears to the arguments of other jurors who are equally honest and intelligent as himself.

Accordingly, although your verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you, however, that you should examine what has been submitted to you with an open mind and with candor and proper regard and deference to the opinion of each other.

It is your duty to decide the case if you can conscientiously do so. You should listen to each other's arguments with the disposition to be convinced.

If much the larger number favors one side or the other, the dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error as to his views.

I want you to go back to the jury room and continue your deliberations. Discuss the matter among yourselves in a friendly spirit and endeavor to agree upon a verdict.

Before the charge was read to the jurors, defense counsel objected:

The paragraph where it says, "each juror should – each juror shall listen with deference to the argument of the other jurors and with the distrust of his judgment if he finds a large majority

> of the jury takes a different view of the case from what he himself takes."
>
> We feel like that is giving the jury the idea that the Court believes that the verdict should be – go along with what the majority feels. That the individual juror should go along with what the majority of what the other jurors feel.
>
> The same thing with the paragraph that says, "you should listen to each other's arguments with the disposition to be convinced. If the much larger number favor one side or the other, the dissenting juror should consider whether, in light of the opinions that are expressed by the other jurors in the jury room, he is not in error as to his views."
>
> That is telling the juror that if he is not in the majority, that he may be in error in his views. And that's giving that juror the impression that the Court is making that judgment of that juror.
>
> These objections were overruled.

Appellant now contends that specific language in the court's charge, not found in the original *Allen* charge, *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), was a misstatement of the law. Further, this relates to the court's instruction to the jury that "a decision has to be reached by a jury. You are that jury . . . "

Defense counsel objected to specific language in the charge, but not to the the [sic] language complained of on appeal. To preserve error a trial objection to the charge must distinctly specify each ground of objection. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1988). Objections to the charge must be made before it is

read to the jury, and must specify every ground of objection. *Blackwell v. State*, 294 S.W. 852, 854-55 (Tex. Crim. App. 1927). The error asserting improper instruction is based on a claim which was not presented as a timely objection to the trial court's charge. *Barber v. State*, 737 S.W.2d 824, 835 (Tex. Crim. App. 1987); *Paul v. State*, 544 S.W.2d 668, 672 (Tex. Crim. App. 1976); *Pittman v. State*, 434 S.W.2d 352, 359-360 (Tex. Crim. App. 1968). Given the objection made on appeal, the court would have had an opportunity to delete the complained of language.

A significant deviation from the standard *Allen* charge may constitute grounds for reversal if that deviation has a coercive effect on the jury. *United States v. Amaya*, 509 F.2d 8, 13 (5th Cir. 1975). In this case the language did not have such a coercive effect. "It did not threaten the jury, set a deadline, or coerce them to set aside their scruples and arrive at a verdict." *United States v. Anderson*, 679 F.2d 1199, 1203-04 (5th Cir. 1982). While informing the jury that they were the jury that had to reach a decision, the court had also informed them that "some jury, sometime, will have to decide this question." The court further informed the jurors that they should reach a decision "if at all possible," not that they *must* reach a decision.

It has been held that when the charge is not coercive on its face, the appellant must show either that the charge is likely to cause jury misconduct or that jury misconduct, in fact, has occurred. *Davis v. State*, 709 S.W.2d 288, 291 (Tex. App. – Corpus Christi 1986, pet. ref'd), *cert. denied*, 107 S. Ct. 2198, citing *Calicult v. State*, 503 S.W.2d 574, 576 n.3 (Tex. Crim. App. 1974).

Appellant argues that the *Allen* charge instructs the jury to consider the positions and views of the majority and this is a consideration irrelevant to the issue of guilt. Further, he contends that the charge in this case was a misstatement of the law, coercive, and encouraged the jury to consider extraneous matters irrelevant to guilt and that therefore appellant was denied his right to due process and due course of law as provided by the federal and state constitutions. He further argues that these questions received only cursory treatment in *Arrevalo v. State*, 489 S.W.2d 569 (Tex. Crim. App. 1973). It is appellant's position that this court should overrule the precedent supporting the *Allen* charge.

The use of an *Allen* charge has been reviewed and approved in Texas case law. *Stanton v. State*, 535 S.W.2d 182 (Tex. Crim. App. 1976); *Arrevalo v. State*, 489 S.W.2d 569 (Tex. Crim. App. 1973); *Davis v. State*, 709 S.W.2d 288 (Tex. App. – Corpus Christi 1986, pet. ref'd), *cert. denied*, 107 S. Ct. 2198; *Ray v. State*, 649 S.W.2d 142 (Tex. App. – Fort Worth 1983, pet. ref'd). We decline to disapprove its use under the circumstances of this case. The third point is overruled.

Finally, appellant argues the jury should have been instructed on the law of parole pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a). The court instructed the jury not to "discuss how long the defendant would be required to serve in order to satisfy the sentence imposed." Appellant did not object to the court's charge on punishment. In the absence of objection, an error in the charge will require reversal only if the error is so egregious and created such harm that the accused was denied a fair trial. *Almanza v. State*, 686

S.W.2d 157 (Tex. Crim. App. 1984). Appellant contends that he suffered egregious harm because the jury was not informed that he would have to serve at least one-third (or twenty years) before becoming eligible for parole. Appellant claims that if the jury had been so informed, his sentence would likely have been less than the life term imposed.

The courts addressing this issue have uniformly held that the failure to give this kind of instruction does not constitute fundamental error.[1] *Hyde v. State, supra; Cortez v. State,* ___ S.W.2d ___ (Tex. App. – Dallas No. 05-86-1165-CR, July 28, 1987); *Henry v. State,* 732 S.W.2d 443 (Tex. App. – Beaumont 1987, no pet.); *Estes v. State,* 723 S.W.2d 753 (Tex. App. – Austin 1986, no pet.). We cannot say that failure to so charge the jury amounted to *Almanza* fundamental error. The point of error is overruled.

The judgment is affirmed.

SHIRLEY W. BUTTS,

Associate Justice

DO NOT PUBLISH.

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[1] The Texas Court of Criminal Appeals subsequently ruled that article 37.07 § 4(a), the instruction statute, is unconstitutional. *Rose v. State,* ___ S.W.2d ___, No. 193-87 (Tex. Crim. App. Nov. 12, 1987) (not yet reported).

NO. 86-CR-3935-A-W1

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	226TH DISTRICT COURT
	§	
MICHAEL J. BOYD	§	BEXAR COUNTY, TEXAS

ORDER

Michael J. Boyd has filed a pro se application for post conviction writ of habeas corpus under the provisions of 11.07 C.C.P. collaterally attacking his conviction in cause number 86-CR-3935.

HISTORY OF THE CASE

Applicant was convicted of committing the offense of Aggravated Sexual Assault on February 13, 1987. Punishment was assessed at life imprisonment in the Texas Department of Corrections. The Court of Appeals for the Fourth Supreme Judicial District affirmed Applicant's conviction with mandate issued on June 13, 1988. Applicant filed this petition for writ of habeas corpus on May 17, 1990.

ALLEGATIONS OF APPLICANT AND FINDINGS OF FACT

A claim of insufficient evidence cannot be raised in a writ of habeas corpus proceeding. *Ex Parte Easter,* 615 S.W.2d 719 (Tex. Cr. App. 1981). Only a claim of no evidence will be considered in a writ of habeas corpus proceeding therefore, Applicant's first ground of error is without merit. *Ex Parte Moffett,* 542 S.W.2d 184 (Tex. Cr. App. 1976).

Applicant alleges, in his second ground of error, that the jury instructions relieved the State of its burden of proof by failing to define "criminal episode."

"If the application portion of the jury charge instructs the jury with respect to each element of the offense and the charge does not authorize condition on proof of less than all of the required elements constituting the offenses, no fundamental error will exist. *Lewis v. State,* 656 S.W.2d 472 (Tex. Crim. App. 1983). The portion of the charge to be examined in determining whether it is fundamentally defective for improper or omitted definitions is in the abstract portion of the charge. *Lewis v. State,* supra."

"The charge given did not authorize a finding of guilty without requiring the jury to find all of the requisite elements of the offense charged. (See Attachment) The fact that the charge failed to define "criminal episode" in the charge's abstract did not relieve the State of its burden of proof since an element of the offense is not omitted when the trial court applies the law to the facts of the case in its charge, which it did. *Rohlfing v. State,* 612 S.W. 2d 598 (Tex. Crim. App. 1981). Specifically defined words do not need to be defined in a jury charge if the jury could not have been misled by the court's failure to define the word(s)." *Olveda v. State,* 625 S.W.2d 13 (Tex. Crim. App. – San Antonio, 1981) (reversed on other grounds); 650 S.W.2d 408 (Tex. Crim. App. 1983).

Applicant's third, fourth, fifth and sixth grounds of error were previously raised on direct appeal. (See Attachment) They cannot form the basis of relief in an

application for post-conviction writ of habeas corpus. *Ex Parte Acosta,* 672 S.W.2d 470 (Tex. Crim. App. 1984).

Applicant alleges, as his seventh ground of error, that he was denied the sixth amendment right to effective assistance of counsel. Allegations of ineffective assistance of counsel must be firmly founded in the record, and the burden is on the Applicant to demonstrate the ineffectiveness. *Johnson v. State,* 614 S.W.2d 148 (Tex. Crim. App. 1981); *Simmons v. State,* 594 S.W.2d 462 (Tex. Crim. App. 1980). Applicant has failed to meet this burden.

Applicant alleges, as his final ground of relief, that the jury charge defined "serious bodily injury" thereby allowing the jury "to find Applicant guilty of rape on a theory not alleged in the indictment." Both the indictment and the charge are identical setting out all the elements of Aggravated Sexual Assault. This ground of error is without merit.

CONCLUSION OF LAW

The Applicant has not demonstrated any grounds which would entitle him to relief. Therefore, this Court recommends that the application for writ of habeas corpus be denied.

ORDERS

The District Clerk of Bexar County, Texas, is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Mr. Fred G. Rodriguez
Criminal District Attorney
Bexar County Justice Center
Bexar County, Texas 78205

c. The Office of Jim Mattox
Attorney General Of Texas
Enforcement Division
Capitol Station
Austin, Texas 78711

d. Michael J. Boyd
Route 3, Box 59
Rosharon, Texas 77583

SIGNED, ORDERED and DECREED this 20 day of June, A.D., 1990.

/s/ _____
JUDGE PRESIDING